IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

LORIMAR MUSIC A CORP., *et al*	)	
	)	
Plaintiffs,	)	
	)	Case No. 09-6067-CV-SJ-FJG
v.	)	
	)	
BLACK IRON GRILL COMPANY, *et al.*	)	
	)	
Defendants.	)	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

COME NOW Plaintiffs Lorimar Music A Corp., *et al.* (hereinafter, "Plaintiffs") and for their Reply in Support of their Motion for Summary Judgment [Dkt. # 28] and in Response to Plaintiff's Suggestions in Opposition [Dkt. # 38], state and show the Court as follows:

INTRODUCTION

Plaintiffs are entitled to summary judgment because the undisputed facts demonstrate that Defendants violated the copyrights to Plaintiffs' musical compositions. Without disputing these facts, Defendants' Suggestions in Opposition allege several arguments that are routinely rejected by courts. Defendants attempt to paint themselves as naïve innocents who would have not have infringed Plaintiffs' copyrights if only they had known better. Nothing could be further from the truth. In fact, just last month, an independent investigator again witnessed Defendants' continuing infringing conduct. Defendants are without any viable legal defenses and their pleas for leniency are unconvincing. The Court should award Plaintiffs summary judgment granting them the relief they seek.

I. RESPONSE TO DEFENDANTS' ATTEMPT TO CONTROVERT PLAINTIFFS' STATEMENT OF FACTS

Defendants have failed to properly controvert Plaintiffs' Statement of Facts and therefore under W.D. Mo. Local Rule 56.1 all such facts are deemed admitted. In responding to Plaintiffs'

Statement of Facts ("SUF"), Defendants did not address any specific enumerated statement of fact, but rather only generally addressed one of the three subsections. Defendants made *no* attempt to address SUF ¶¶ 1-6; 21-26. And in violation of the local rules, they made four general statements that are apparently designed to controvert facts stated in SUF ¶¶ 7-20. This procedure is simply not allowed and each of Plaintiffs' Statement of Facts are deemed admitted.[1]

II. ARGUMENT

A. NO SHOWING OF WILLFULLNESS IS REQUIRED IN ORDER TO HOLD DEFENDANTS LIABLE FOR COPYRIGHT INFRINGEMENT

Defendants attempt to create an issue of material factual by requesting that the Court find that their infringements were not "willful." [Dkt. # 38, p. 5]. While Plaintiffs would argue that Defendants' actions suggest they are willful infringers, a finding of willfulness is not necessary for the award of damages requested by Plaintiffs. *See* 17 U.S.C. 504(c)(1). The law is clear that lack of intent to infringe does not shield the infringer from liability. *U.S. Songs, Inc. v. Downside Lenox, Inc.*, 771 F. Supp. 1220 (N.D. Ga. 1991); *Int'l Korwin Corp. v. Kowalczyk*, 855 F.2d 375, 380-81 (7th Cir. 1988). Nor is actual knowledge of the infringing performances required for an infringer to be held liable. *Boz Scaggs Music v. KND Corp.*, 491 F. Supp. 908, 913 (D. Conn. 1980).

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[1] This Court's Local Rule 56.1(a) requires the following:

> Suggestions in opposition to a motion for summary judgment shall begin with a section that contains a concise listing of material facts as to which the party contends a genuine issue exists. *Each fact in dispute shall be set forth in a separate paragraph, shall refer specifically to those portions of the record upon which the opposing party relies, and, if applicable, shall state the paragraph number in movant's listing of facts that is disputed.*

(Emphasis added.) These requirements help to "distill to a manageable volume the matters that must be reviewed by a court undertaking to decide whether a genuine issue of fact exists for trial." *Jones v. UPS*, 461 F.3d 982, 990 (8th Cir. 2006). It is designed "to prevent a district court from engaging in the proverbial search for a needle in the haystack." *Id.* (quoting *Northwest Bank & Trust Co. v. First Ill. Nat'l Bank*, 354 F.3d 721, 725 (8th Cir. 2003)).

Unless the nonmovant's suggestions in opposition conform to Fed. R. Civ. P. 56(e)(2) and Local Rule 56.1, the Court shall deem the movant's facts admitted. Fed. R. Civ. P. 56(e)(2) ("If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party."); Local Rule 56.1(a) ("All facts set forth in the statement of the movant *shall be deemed admitted* for the purpose of summary judgment unless *specifically controverted* by the opposing party" (emphasis added)); *see Jones*, 461 F.3d at 991 (affirming District Court for the Western District of Missouri's decision to disregard plaintiffs' factual response because it did not comply with Local Rule 56.1).

As the *Billy Steinberg* court succinctly concluded: "In truth, copyright could not survive a rule which requires actual knowledge of infringement to create liability." *Billy Steinberg Music v. Cagney's Pub, Inc.*, No. 87 C 2546, 1988 WL 35518, at * 2 (N.D. Ill. Apr. 12, 1988). Because only a request for damages under 17 U.S.C. 504(c)(2), which provides for statutory damages up to $150,000 per infringement, requires a finding of willfulness there is no material issue of fact that exists on this issue that would preclude entry of summary judgment.[2]

B. PLAINTIFFS' DEMAND FOR STATUTORY DAMAGES IS WARRANTED

1. Defendants' Claim that They Did Not Understand the Need for an ASCAP License is Irrelevant and Not Credible.

Defendants seek to lessen the amount of statutory damages by offering several unconvincing arguments. First, Defendants contend that they did not realize that their conduct constituted copyright infringement and that they believed they did not need an ASCAP license. In fact, ASCAP contacted Defendants repeatedly to explain Defendants' need for an ASCAP license. In response to these contacts, defendant Mr. DeBuhr telephoned an ASCAP representative and threatened him with physical harm. Thereafter, ASCAP even corresponded with Defendants' attorney regarding the licensing of the Black Iron Grill. Despite these contacts, Defendants still refused to obtain an ASCAP license. Such conduct cannot be the basis for a reduction in damages awarded to Plaintiffs.

2. Defendants Knowingly Infringed ASCAP Members' Copyrights As Recently As June 24, 2010.

Defendants also make much of the fact that the Amended Complaint alleges infringement of Plaintiffs' songs on only one night over a year ago. Moreover, Defendants swear that they have taken steps to avoid further infringement of songs in the ASCAP repertory, even claiming that no

[2]Since 1988, Congress has twice increased the statutory damages range under 504(c)(1). (Doubling damage range for each infringement from $250-$10,000 to $500-$20,000 (Pub. L. 100-568, 102 Stat. 2853, 2860, October 31, 1988) and then to $750-$30,000 (Pub. L. 106-160, 113 Stat. 1774, December 9, 1999)). These increases demonstrate that Congress supports the intended purpose of the statutory damages provision—to discourage copyright infringement. Thus, Plaintiffs' request for damages of $4,000 for each infringement is neither inappropriate nor excessive.

ASCAP licensed compositions have been performed since this action was filed. [Dkt. # 38, pp. 4; 7]. Based on these assertions, Defendants argue that Plaintiffs should not be awarded damages in the amount they seek.

In reality, Plaintiffs obtained rebuttal evidence of Defendants' infringing performances as recently as June 24-25, 2005. *See* **Exhibit 1** (Supplemental Declaration of Doug Jones). ASCAP engaged Dennis Sichner, an independent investigator, to visit the Black Iron Grill on that night and write down all the songs he heard performed which he could identify. *See* **Exhibit 2** (Supplemental Declaration of Dennis Sichner). Sichner's investigator report indicates that Karaoke music was provided by TCB Music, the same company that performed on the night of the infringements in 2009. The investigator's report contains evidence that at least nine songs from the ASCAP repertory were performed without authorization on June 24-25, 2010. *Id.* This rebuttal evidence belies any notion that Defendants have taken any action to comply with the Copyright Law, that they have stopped infringing on copyrighted musical works in the ASCAP repertory, or, because they employed the same unlicensed Karoake service over a year after this action was filed, that they even believed that they were in compliance with the law. Accordingly, Defendants' emphasis on the number of nights the songs in suit were performed at the Black Iron Grill is misplaced.[3]

3. Defendants' Alleged Impoverishment Does Not Affect Plaintiffs' Right to Recover the Full Amount of Statutory Damages and Attorneys' Fees They Seek.

Defendants' claim that their business is unprofitable is no defense to liability for infringement.[4] Courts confronted with similar pleas of poverty in virtually identical copyright infringement actions routinely ignore the pleas. For example, in *Ice Nine Pub. Co., Inc. v. Barnes*,

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[3] If Defendants infringed on seventeen songs during the only two nights an investigator visited Black Iron Grill an obvious conclusion is that when no investigator was present dozens if not hundreds of copyrighted songs were performed at the establishment without authorization since August 2008.

[4] Despite Defendants' bald assertions of financial hardship, Plaintiffs note several contradicting : in 2008, the only full year for which Defendants were able to provide tax returns for Black Iron Grill Co., the establishment had $1,191,000 in gross receipts and spent $32,250 on entertainment. An establishment with over one-million dollars in revenues that spends ten-of thousands of dollars on entertainment would hardly seem to be on the verge of collapse. Plaintiffs also note that Defendants own the building that houses the Black Iron Grill.

No. 89-3227, 1990 WL 236055 (C.D. Ill. Sept. 14, 1990), the district court rejected the defendant's argument that the infringement was excusable because his business was unprofitable. The court stated: "[T]here is no provision in the copyright act that excuses unprofitable businesses from obtaining copyright licenses." *Id.* at *2. Even if Defendants' business is unprofitable, that alone would neither support a defense to an action for copyright infringement nor justify the reduction in statutory damages sought by defendants in this case. *Id.* Despite Defendants' unsupported protestations of impoverishment, the Court should award statutory damages of $4,000 per each of eight infringements ($32,000 in the aggregate) listed in the Amended Complaint.

C. DRUNK KARAOKE PERFORMANCES DO NOT CONSTITUTE "FAIR USE"

Defendants assert that the unauthorized performances at Black Iron Grill constitute "fair use" under 17 U.S.C. 107 because they were performed by bar patrons participating in Karaoke. Defendants appear to have lifted their argument directly from argument presented by the defendants in *Morganactive Songs v. K & M Fox, Inc.* 77 USPQ 2d 1065 (S.D. Ind 2005) (opinion attached as **Exhibit 3).** Ironically, the *Morganactive Songs* court flatly rejected this argument and held the defendants liable for the Karaoke performances. Such performances simply do not qualify for the "fair use" defense under the Copyright Law.

Defendants' attempt to transform a performance into a parody is fatally flawed. There is no dispute that patrons who sing Plaintiffs' songs may be inebriated or that their renditions may be amusing. Regardless, it is still a performance of the underlying copyrighted musical work. No new work is created as a result of the performance. Neither Defendants nor their Karaoke disc jockeys record the performances or attempt to reproduce or distribute them in any manner.

The performance itself fulfills none of the purposes that justify holding a parody of a copyrighted work to be fair use. "To describe a karaoke rendition of any song as a parody is too big of a stretch." *Id.* at 1068. The *Morganactive Songs* court fully explained why *Campbell v. Acuff-*

Rose Music, Inc., 510 U.S. 569 (1994), (the only case cited by Defendants in support of their fair use claim) does not apply to Karaoke performances in a bar. Defendants confuse parody with burlesque, which is not protected as fair use. *See Ty, Inc. v. Publ'ns Int'l, Ltd.*, 292 F.3d 512, 518 (7th Cir. 2002) ("A burlesque . . . is often just a humorous substitute for the original [work] and so cuts into the demand for it . . . Burlesques of that character, catering to the humor-loving segment of the original's market, are not fair use.") (citations omitted). The Karaoke performances at Black Iron Grill are not new works, they are merely another manner of presentation.

Moreover, Karaoke performances for the entertainment of Defendants' patrons hardly rises to the level of use for which the protection of Section 107 is generally intended: "for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research." 17 U.S.C. 107. As to the illustrative factors set out in Section 107, [5] Defendants satisfy none of the considerations. First, there is a decided commercial purpose served by Defendants' Karaoke performances. The performances constitute musical entertainment to attract customers, and the character of the usage is functionally no different from any other form of musical entertainment. Second, the "work" at issue is not a "work" at all; no copyright has been sought, and none could be obtained for a performance. Third, it is undisputed that regardless of whether individual audience members may succeed in singing Plaintiffs' songs, the Defendants' Karaoke performances require use of the entirety of Plaintiffs' works. And fourth, as to the effect of the use upon the potential market for or value of the work, the "market" is simply any venue in which Plaintiffs' songs may be performed publicly—in this case, nightclubs, cabarets, bars and other establishments like Black Iron Grill. Free use by means of Karaoke in Black Iron Grill directly diminishes the value of the Plaintiffs' works by depriving them of fair compensation for the use at issue. In their analysis of this factor, Defendants argue that their use of Karaoke poses no threat to diminish the market for the original composition. [Dkt. #38, p. 6]. All well and good for the recording *artists*, but what of the *copyright owners of the musical works*, who have an exclusive right to be compensated for public performances of their works, independent of any compensation arrangements for authorized recordings?

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[5] Section 107 provides these four factors for consideration of fair use:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

Defendants' fair use argument fails on its face. The drunken Karaoke performances at the Black Iron Grill do not rise to the level of parody and satisfy none of the "fair use" factors contemplated by Section 107. The Court should follow the *Morganactive Songs* analysis and conclude that unauthorized Karaoke performances of copyrighted music are no different from any other manner of performance. Accordingly, Plaintiffs are entitled to summary judgment and damages.

D. Plaintiffs Should Be Awarded the Full Amount of Attorneys' Fees They Seek

Defendants note that an award of attorney's fees is discretionary and assert that Plaintiffs' request for attorneys' fees is "excessive." As we noted in our earlier brief, the award of attorneys' fees in these cases is "the rule rather than the exception. . . ." *Casey v. Gentry*, No. 87-1108-CV-W-9, 1989 WL 128266, at *5 (W.D. Mo. July 10, 1989). The courts in the Western District have followed this rule, routinely awarding attorneys' fees to ASCAP's members in similar copyright infringement actions. *See Cross Keys Pub. Co., Inc. v. LL Bar T Land & Cattle Co., Inc.*, 887 F. Supp. 219, 224 (E.D. Mo. 1995); *Moose Music v. D'Agostino*, No. 1:92:CV:312, 1992 WL 12601925, at *2 (W.D. Mo. Dec. 23, 1992); *Prater Music v. Williams*, No. 87-0362-CV-W-6, 1987 WL 46354, at *4 (W.D. Mo. Nov. 3,1987) ("[T]here is precedent in the Western District of Missouri for a full award [of attorneys' fees]").

1. Defendants' Failure to Cooperate Increased Plaintiffs' Attorneys' Fees.

If perhaps the attorneys' fees Plaintiffs seek are higher than the norm in cases such as this, it is only because of the difficulties Plaintiffs and their counsel encountered in their dealings with

Defendants. Defendants failed to respond sufficiently to Plaintiffs' request for document production and failed to cooperate with routine pre-trial filings, forcing Plaintiffs to incur increased expenses. Plaintiffs also had to respond to Defendants' specious affirmative defenses. Defendants stand before this Court as deliberate infringers who have chosen to fight tooth and nail. Scorched-earth, no-holds-barred litigation is not without attendant costs. *See Lipsett v. Blanco*, 975 F.2d 934, 939 (1st Cir. 1992) ("Appellants mounted a Stalingrad defense, resisting [the plaintiff] at every turn and forcing her to win her hard-earned victory from rock to rock and from tree to tree . . .While this hard-nosed approach to litigation may be viewed as effective trench warfare, it must be pointed out that such tactics have a significant downside."). Defendants' recalcitrance has unnecessarily prolonged this matter.

2. Plaintiffs' Attorneys' Fees are Reasonable.

Consideration of the reasonableness of the attorneys' fees request requires application of the principles established by the Fifth Circuit Court of Appeals in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) and adopted by the Eighth Circuit in *Allen v. Tobacco Superstore, Inc*. 475 F.3d 931, 944 (8th Cir. 2007). There, the court formulated twelve factors to be considered by a court in determining whether the amount of attorneys' fees requested is reasonable. *Id.* at 717-19. So applied, the relevant *Johnson* factors demonstrate the reasonableness of that request.[6]

a. Requisite Skill

Plaintiffs' counsel has shown that they possess the requisite skill to handle this case properly, and their billing rates are appropriate in view of their experience, reputation and abilities. Lead counsel Robert Lesley and Joan Archer have years of experience with intellectual property

[6]Some of the *Johnson* factors are not applicable here. For example, Plaintiffs' counsel have not been precluded from seeking other employment; there is no fixed or contingent fee arrangement with the law firm; there was no time limitation nor any undesirable elements in the case; and the results are not yet known.

litigation, and particularly with the representation of ASCAP members. Defendants' counsel offers his own billable rate for comparison. [Dkt. # 38, p. 8]. However, to the best of Plaintiffs' knowledge, Mr. Smith has little to no experience with intellectual property litigation or other Federal court practice. Thus, the fees requested are, we submit, customary and reasonable.

b. Fee Awards in Similar Cases

The fees requested are also reasonable when considering attorneys' fee awards in similar cases. Courts routinely award costs, including reasonable attorneys' fees, to the prevailing plaintiffs in uncomplicated copyright infringement actions. The amounts plaintiffs have requested as attorneys' fees on identical summary judgment motions are entirely a function of the vigor with which infringers defend such actions. Thus, numerous courts have awarded substantial attorneys' fees in similar infringement actions where the circumstances of the particular case warrants such an award. *See Foreverendeavor Music, Inc. v. S.M.B., Inc.,* 701 F. Supp. 791, 794 (W.D. Wash. 1988) (attorneys' fees of $10,372.00 on summary judgment upon finding that "[i]f the legal fees seem high, defendants have themselves to blame, not only for failing to determine their responsibilities under the copyright law before suit was filed against them, but also for refusing to participate in the discovery process even after they were ordered to do so by the Magistrate Judge"); *Broadcast Music, Inc. v. Behulak*, 651 F. Supp. 57 (M.D. Fla. 1986) (attorneys' fees of $41,887.50 awarded after trial but specifically for time expended through filing of the motion for summary judgment).

c. Time and Labor Required

The time and labor expended by Plaintiffs' counsel were reasonable and the work performed by them was not duplicative. Each of the attorneys involved in this litigation had different responsibilities and performed necessary services. Plaintiffs counsel also made a concerted effort to control fees by delegating work to those will the appropriate experience. For example, the majority of all briefing, discovery, and pre-trial filing was prepared by associate Kate O'Hara Gasper, who is a recent law school graduate with a markedly lower billable rate. Additionally, due to the requirements of the Court's Scheduling and Trial Order, Plaintiffs' counsel has expended time and labor to prepare for trial and meet all appropriate deadlines. Plaintiffs further note that Defendants have failed to submit initial disclosures, a witness list, exhibit list, deposition designations, or other mandatory pre-trial filings. Because Plaintiffs strive to meet procedural filing obligations, they have undoubtedly expended more time to pursue this case than Defendants.

d. Customary Fees for Similar Work

Plaintiffs' affidavit in support of their request for attorneys' fees shows that the hourly fees requested represent the usual billing rates in Missouri for work performed in connection with similar copyright infringement litigation.

ASCAP has been attempting to license Defendants since August 2008. Defendants' pattern of misconduct and threat to ASCAP's representative have forced Plaintiffs to file this action. Ms. Gasper's April 12, 2010 Affidavit supplies details regarding amount of time billed on this action—as of filing for summary judgment. [Dkt. # 29-8]. Plaintiffs hereby submit an updated affidavit that details additional fees accrued through summary judgment reply and pre-trial filings. **Exhibit 4** (Supplemental Affidavit of Kate O'Hara Gasper). Plaintiffs merely ask the Court to take note of the substantial time devoted to developing the account of this case, much of which resulted from Defendants' intransigence and Plaintiffs' compliance with the Court's Scheduling Order. As a result, Plaintiffs' application for attorneys' fees and costs in the amount of $35,226.06 is reasonable and should be granted in full. To conclude the point, by any standard, the amount of attorneys' fees Plaintiffs seek is immanently reasonable.

III. CONCLUSION

For the reasons stated above and in the papers earlier submitted by Plaintiffs, Plaintiffs' Motion for Summary Judgment should be granted awarding Plaintiffs injunctive relief, statutory damages of $4,000 per count for a total of $32,000 and costs including reasonable attorneys' fees in the amount of $35,226.06.

Respectfully submitted,

LATHROP & GAGE LLP

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was filed via ECF this 12th day of July, 2010, to the following counsel for the defendants, addressed as follows:

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